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No. 90-826

In the Supreme Court of the United States

OCTOBER TERM, 1990

LIONEL MARQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion to withdraw his guilty plea pursuant to Fed. R. Crim. P. 32(d).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 909 F.2d 738.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. On October 15, 1990, Justice Marshall granted an extension of time within which to file a petition for a writ of certiorari to and including November 23, 1990. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of New York to distribu-

ion and possession with intent to distribute multiple kilograms of heroin (21 U.S.C. 841(a)(1), 841(b)(1)(A), and 841(b)(1)(B)), and conspiracy to commit that offense (21 U.S.C. 846); conducting a continuing criminal enterprise (21 U.S.C. 848(a)); evading income taxes (26 U.S.C. 7201); and conducting and participating in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c) and (d)). He was sentenced to 23 years' imprisonment and fined $100,000. The court of appeals affirmed.

1. On December 14, 1987, government agents arrested petitioner and his wife for conspiracy to distribute narcotics and seized various items from their home, including $876,915 in cash. After indicting the couple, the government obtained a restraining order against the cash pursuant to the criminal forfeiture provisions of 21 U.S.C. 853(e)(1). Thereafter, the court of appeals ruled that funds legitimately needed for living expenses, including attorneys' fees, were not subject to restraint or forfeiture under Section 853. See *United States* v. *Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc), rev'd, 109 S. Ct. 2657 (1989).

In the time between the court of appeals' decision in *Monsanto* and this Court's reversal of that decision, the government initiated civil forfeiture proceedings under 21 U.S.C. 881 against the cash that had been seized from petitioner's home. The district court ruled that the court of appeals' decision in *Monsanto* controlled and ordered the government to release $100,000 of the seized funds to pay the initial retainer of petitioner's lawyer and then to release additional funds for legal fees, if needed. The court of appeals affirmed. *United States* v. *$876,915 United States Currency*, 874 F.2d 104 (2d Cir. 1989). The court of appeals also directed the district court to bring the criminal case to trial as soon as possible. *Id.* at 107.

A pretrial conference was held in the criminal case on May 12, 1989. At that conference, the government informed

the district court that it had not yet released the $100,000 check to petitioner's lawyer, Richard Rehbock. The prosecutor announced that the government would release those funds only if Rehbock agreed to a firm trial date no later than June 12, 1989. The prosecutor added that if Rehbock did not agree to such a date, she would ask this Court to stay the order requiring the release of the $100,000, in light of the possibility that this Court would reverse the Second Circuit's decision in *Monsanto*. Rehbock objected, claiming that by placing conditions on the release of the funds, the government was subjecting him to a conflict of interest. Rehbock told the district court that he needed 60 days to prepare for trial and would be ready immediately after July 4. Pet. App. A3.

The district court said that it wanted to bring the case to trial quickly in view of the fact that petitioner and his wife were both being detained pending the trial. The court added that, "forgetting [the prosecutor's] position completely," the court had "more or less fixed" on a trial date of June 12 before the government announced its position. Pet. App. A3. After being informed that counsel for petitioner's wife had a scheduling conflict, the district court set the trial for June 19. The trial was subsequently postponed to July 5. *Ibid.*

2. On June 30, petitioner and his wife pleaded guilty pursuant to plea agreements. At that time, petitioner stood indicted on 23 counts of various narcotics, gambling, racketeering, money laundering, and tax charges, including operating a continuing criminal enterprise, a violation of 21 U.S.C. 848(a). His wife had been named in 19 counts. Petitioner pleaded guilty to six counts, including the Section 848(a) violation, and his wife pleaded guilty to three counts. The plea agreements included a stipulation that petitioner's sentence would be within the range of 240 to 293 months and his wife's sentence would be within the range

of 121 to 151 months. Those sentences were significantly below the Sentencing Guidelines range of 360 months to life, which the government represented would be the range applicable to each defendant's most serious offenses. See United States Sentencing Commision, *Sentencing Guidelines Manual*, § 6B1.2(c)(2). Pet. App. A4. As required under Fed. R. Crim. P. 11, the district court conducted an extensive colloquy with both petitioner and his wife, during which petitioner stated that he "had adequate time to discuss with [his] counsel all the intricacies of this plea" and that he understood his rights and the consequences of pleading guilty. C.A. App. 90-91.

3. On September 5, petitioner moved pro se to withdraw his guilty plea, pursuant to Fed. R. Crim. P. 32(d). He alleged that Rehbock had failed to represent him effectively, because he had failed to prepare and had been interested only in obtaining a fee from the seized funds. Petitioner also alleged that his wife's circumstances put undue pressure on him to plead guilty and that he had not had enough time to study the plea agreement and to discuss it with his lawyer. A hearing was held on October 13. At that hearing, petitioner's current counsel entered their appearances in place of attorney Rehbock and filed supplemental pleadings. At the hearing, Rehbock testified that the $100,000 had been released to him on June 6 and that he had spent the month of June preparing for trial. He also testified that he had had extensive discussions with petitioner both before and after Rehbock discussed the general outlines of the plea agreement with senior representatives of the United States Attorney's Office. Finally, he expressed his opinion that petitioner's guilty plea was voluntary and that all of petitioner's answers during the colloquy with the court at the guilty plea proceeding were truthful.

At the conclusion of the hearing, the district court denied the motion, finding that the plea was voluntary and that

petitioner had been well represented by counsel. The district court acknowledged that part of petitioner's motivation to enter his plea may have been a desire to assist his wife, but concluded that petitioner's plea was not involuntary for that reason.

4. The court of appeals affirmed. The court first found that petitioner's counsel was not laboring under a conflict of interest. Although the court noted that the government had come "perilously close to creating a conflict of interest situation by attempting to extract a concession from [petitioner's attorney] concerning a trial date as a condition of its compliance with the order to turn over the funds," the court stated that the district court "wisely brushed aside the Government's position and set a trial date entirely independently of that position." Pet. App. A6. The court of appeals found that "[t]he initial trial date, June 19, was set without regard to the $100,000 payment," and observed that "the initial trial date was later postponed to July 5, thereby giving [petitioner's attorney] precisely the amount of trial preparation time that he had requested." Pet. App. A6.

The court of appeals also found that petitioner's claim that Rehbock "devoted inadequate attention to representing him [was] belied by the record." Pet. App. A7. The court explained that because of Rehbock's efforts, the "sentence ultimately imposed was seven years less than the minimum term [petitioner] faced before the plea agreement was negotiated." *Ibid.* Moreover, as the court of appeals observed, the district court "was entitled to credit Rehbock's testimony concerning the time devoted to trial preparation." *Ibid.*

The court of appeals rejected petitioner's contention that his plea was involuntary because of the government's position that a plea bargain would not be offered to petitioner's wife unless petitioner pleaded guilty. Pet. App. A7-A8. The court observed that "[s]ince a defendant's plea is not

rendered involuntary because he entered it to save himself many years in prison, it is difficult to see why the law should not permit the defendant to negotiate a plea that confers a similar benefit on others." Pet. App. A8. The court further noted that "all of the other circuits that have considered the issue have concluded that a plea is not invalid if entered (a) under a plea agreement that includes leniency for a third party or (b) in response to a prosecutor's justifiable threat to prosecute a third party if the plea is not entered." Pet. App. A7. The court concluded that "[t]he record supports the finding that [petitioner's] plea was voluntary, and there is no basis for disturbing the District Court's decision denying the motion to withdraw the plea." Pet. App. A10.

ARGUMENT

1. Petitioner contends (Pet. 11-18) that he should have been allowed to withdraw his plea because Rehbock, his lawyer at the time of his plea, had a conflict of interest due to his efforts to obtain his fee out of the funds that were seized from petitioner's apartment.[1] As the court of appeals observed (Pet. App. A5-A6), however, Rehbock's interest in obtaining his fee from the seized funds did not conflict with petitioner's interest in negotiating a plea agreement.[2]

[1] Under Fed. R. Crim. P. 32(d), "[i]f a motion for withdrawal of a plea of guilty * * * is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason." The district court's decision that the defendant has not met his burden of showing a "fair and just reason" is reviewed only for abuse of discretion. *E.g.*, *United States* v. *Acevedo Ramos*, 810 F.2d 308, 311 (1st Cir. 1987); *United States* v. *Suter*, 755 F.2d 523, 525 (7th Cir.), cert. denied, 471 U.S. 1103 (1985); *United States* v. *Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977). The district court's factual findings on this issue are reviewed only for clear error. *Suter*, 755 F.2d at 525; *Michaelson*, 552 F.2d at 475.

[2] As a variant on that allegation, petitioner argues (Pet. 16) that Rehbock was more interested in personal enrichment than in pro-

Nor did Rehbock suffer from a conflict of interest as a result of the government's statement that it would release the seized funds to pay attorneys' fees only if Rehbock agreed to a trial date no later than June 12, 1989. As the court of appeals noted, the district court "brushed aside the Government's position and set a trial date entirely independently of that position." Pet. App. A6. Thus, the initial June 19 trial date was set without regard to the government's effort to place conditions on the $100,000 payment, which the Government was ordered to make without any concession on Rehbock's part. Moreover, the initial trial date was later postponed to July 5, thereby giving Rehbock precisely the amount of trial preparation time that he had requested. Pet. App. A6.

Finally, petitioner claims (Pet. 17) that Rehbock devoted inadequate attention to representing him due to Rehbock's preoccupation with being paid. The record does not support that claim. The plea agreement was the result of negotiations between petitioner and the United States Attorney's Office, which petitioner had initiated 10 months earlier. C.A. App. 160-161, 167-169. At the hearing on petitioner's motion to withdraw his plea, Rehbock testified that he discussed with petitioner all the charges pending against him, C.A. App. 155-156, that he spent a considerable amount of time preparing for trial, including the whole month of June, C.A. App. 173, 175, and that he spent many hours discussing the proposed plea agreement with petitioner, C.A. App. 185, 187-189. The record thus firmly supports the district court's finding that petitioner was

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tecting petitioner's interests. To the extent this argument implies that Rehbock stood to benefit financially from a plea agreement, but not from going to trial, it is wrong. The government had agreed to release funds to pay Rehbock's legal fees on an hourly basis through trial if necessary. C.A. Supp. App. 1-2.

"represented by a very experienced defense counsel who was adequately prepared to try the case." C.A. App. 215. Indeed, the district court characterized Rehbock's representation of petitioner as "exceptional." C.A. App. 215. Because of Rehbock's efforts, the maximum sentence petitioner faced was reduced from life imprisonment to 293 months, and the minimum was reduced from 360 to 240 months. Thus, in a case in which the evidence against petitioner was overwhelming,[3] the sentence ultimately imposed was seven years less than the minimum term petitioner faced before the plea agreement was negotiated. See Pet. App. A7.

2. There is also no merit to petitioner's contention that his guilty plea was rendered involuntary because the government took the position that a plea bargain would not be offered to his wife unless he also pleaded guilty.

The eight other courts of appeals that have considered the issue have all concluded that a plea is not rendered involuntary if it is part of a plea agreement that includes leniency for a third party or a promise by the government not to prosecute a third party when it otherwise could have done so. See *Politte* v. *United States*, 852 F.2d 924, 929-931 (7th Cir. 1988) (reduced sentence for defendant's wife); *Mosier* v. *Murphy*, 790 F.2d 62, 66 (10th Cir.) (charges dismissed against defendant's wife and mother-in-law), cert. denied, 479 U.S. 988 (1986); *Martin* v. *Kemp*, 760 F.2d 1244, 1248 (11th Cir. 1985) (threat to prosecute defendant's wife); *United States* v. *Diaz*, 733 F.2d 371, 374-375 (5th Cir. 1984) (threat to prosecute defendant's sister and brother-in-law); *United States* v. *Usher*, 703 F.2d 956, 958 (6th Cir.

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[3] That evidence included tape-recorded conversations, the testimony of co-defendants, and items seized in various searches, including $876,915 in cash seized from petitioner's residence and seven kilograms of heroin seized from a stash house, the keys to which were found in petitioner's residence. See Gov't C.A. Br. 3-11, 12 n. **.

1983) (reduced sentence for defendant's wife); *Harman* v. *Mohn*, 683 F.2d 834, 836-838 (4th Cir. 1982) (dismissal of charges against defendant's wife); *Cortez* v. *United States*, 337 F.2d 699 (9th Cir. 1964) (reduced charges against defendant's wife), cert. denied, 381 U.S. 953 (1965); *Kent* v. *United States*, 272 F.2d 795, 798 (1st Cir. 1959) (threat to prosecute defendant's fiancee).

As the court of appeals observed, "[s]ince a defendant's plea is not rendered involuntary because he enters it to save himself many years in prison, it is difficult to see why the law should not permit the defendant to negotiate a plea that confers a similar benefit on others." Pet. App. A8. That is especially so in a case such as this one, where petitioner approached the United States Attorney's Office with the idea of a "package plea" for himself and his wife. C.A. App. 175-176. The district court conducted an extensive allocution under Rule 11, Fed. R. Crim. P., to ensure that petitioner's plea was voluntarily made, the role of petitioner's wife in the criminal activity and the extent of her benefit under the plea agreement were "fully aired" before the district court, and both petitioner and his wife were "ably represented by separate counsel." Pet. App. A10. Petitioner does not claim that the government had insufficient cause to prosecute his wife, and prosecuted her only to coerce a plea from petitioner. As such, the record fully supports the finding that petitioner's plea was voluntary.[4]

[4] Petitioner's reliance (Pet. 20) on *United States* v. *Daniels*, 821 F.2d 76 (1st Cir. 1987), is misplaced. There, the court of appeals reversed a district court's denial of a defendant's motion to withdraw his guilty plea in large part because the government violated Fed. R. Crim. P. 11(e)(2) by "fail[ing] to tell the court at the Rule 11 hearing that it had made clear to Daniels that it would not accept guilty pleas from his two codefendants unless he also pleaded guilty." 821 F.2d at 79. Here, there was no Rule 11 violation; the consequences of the plea agreement to both petitioner and his wife were "thoroughly aired" at the time they pleaded guilty. Pet. App. A10.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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